Supreme Court, U.S.
FILED
MAY 1 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1374.

In the Supreme Court of the United States.

OCTOBER TERM, 1980.

STATE OF RHODE ISLAND,
PETITIONER,

v.

RALPH DEMASI AND LAWRENCE M. LANOUE,
RESPONDENTS.

Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of Rhode Island.

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Question Presented.

Whether the Supreme Court of Rhode Island erred in suppressing, on Fourth Amendment grounds, evidence seized from the trunk of the respondents' automobile, where the court found that (1) the officer who stopped the respondents' vehicle lacked any "articulable suspicion" for the detention, and that (2) even if the initial stop was proper, the length of the detention was unreasonable. *Terry* v. *Ohio*, 392 U.S. 1 (1968); *Wong Sun* v. *United States*, 371 U.S. 471 (1963).

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Statement of the Case.

Patrolman James Calabro of the Pawtucket Rhode Island Police Department was alone on cruiser duty at 4 A.M. on October 8, 1974, when he observed a 1968 Mercury bearing Rhode Island license plates on Industrial Highway in Pawtucket. The Mercury, with three male occupants, appeared in good working condition and was proceeding in an orderly fashion: the car was not speeding, the tail lights were working, there were no loud muffler noises, and the officer did not observe any sort of traffic or vehicular violation. The only reason Officer Calabro noticed the car was that it seemed to

ride low in the rear, so that when crossing the railroad tracks on Industrial Highway, the rear bumper touched the tracks, emitting sparks. This was not unusual, as the officer knew there was a hump in the road at the track crossing. The officer acknowledged that a heavily laden vehicle constitutes no infraction of Rhode Island law.

Officer Calabro followed the vehicle, whose rear seat passenger glanced back at him. Despite the fact that the vehicle's occupants knew they were being followed by a police car, the driver did not accelerate or fail to observe traffic signs. For the ten to twelve blocks that the officer followed the vehicle, it continued to proceed in an essentially straight line, following an easterly direction, with some turns dictated by the geography of the area. During the entire time that the vehicle was within the officer's range of vision, no traffic or vehicular irregularities were observed. Officer Calabro testified at the motion to suppress hearing that he did not recognize any of the vehicle's occupants. He had been on duty since midnight, and had received no reports of criminal activity in the vicinity. Yet, on these observations — or lack thereof — the officer flashed his lights and radioed for assistance: "I wanted that vehicle stopped."

Once signalled by the police, the driver pulled over and stopped immediately. In response to the question, "When you . . . signalled your attention to that motor vehicle that you wished to stop it, did it attempt to elude you?", the officer replied, "No, it pulled over."[1] On the officer's demand, the driver promptly produced license and registration, both of which were in proper order. The passengers were also asked to give identification and respondent DeMasi verbally identified himself as "Raymond Massey."

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[1] *State of Rhode Island* v. *Lawrence M. Lanoue*, Ind. No. 75-349, Tr. 26.

The requested documents having been produced by the driver, the officer nonetheless did not release the vehicle. He instead returned to his cruiser and ran an NCIC check on all three occupants of the car. The check revealed an outstanding Massachusetts warrant only on the driver, the respondent Lawrence M. Lanoue, who was immediately arrested.

The police then ordered the front seat passenger, the respondent Ralph DeMasi, to get out of the car. The police observed gloves, a screwdriver and jewelry in the seat the respondent was forced to vacate. This respondent was taken into custody also and transported to the police station, during which interval he was recognized as Ralph DeMasi — known to be wanted by the Massachusetts police. The Mercury was brought to the police station and placed under guard.

Several hours after the respondents were taken into custody, the police learned of an overnight burglary of five hundred pounds of jewelry from the Regina Manufacturing Co. in Pawtucket, several miles from where Officer Calabro stopped the respondents' vehicle. Application for a warrant to search the trunk of the Mercury was made, and the respondents were consequently indicted on the basis of the evidence found therein.

Reasons for Denying the Writ.

I. Decision of the Rhode Island Supreme Court.

The opinion below exhaustively relates the facts leading to the seizure of the respondents, and correctly focuses the issue for decision on "whether the stop of Lanoue's vehicle by the Pawtucket police was reasonable under the Fourth Amendment. . . ." The State conceded below that Officer Calabro

did not have probable cause to stop the Mercury,[2] and the court focused its inquiry on whether the stop was justifiable under the well-established standard of *Terry* v. *Ohio*, 392 U.S. 1 (1968). The court found that "Officer Calabro's decision to radio for assistance and to stop the vehicle was based solely on the fact that at the time he first spotted the Mercury, the back of the car was overweighted and it struck the railroad tracks."[3] The court concluded that "[t]he objective facts taken together could only support a mere inarticulate hunch that criminal activity was afoot. Such a hunch was insufficient under *Terry* and its progeny to justify the stop of Lanoue's Mercury."[4]

II. The Initial Stop of Respondents' Vehicle was Based on an Officer's Unspecified "Hunch" of Criminal Activity.

The sole basis for Officer Calabro's stop of the respondents' automobile in the early morning hours of October 8, 1974, is that the vehicle rode low in the rear, and the back seat

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[2] *See* Appendix A, page 14a, to State's Petition for Writ.

[3] *Ibid.*, p. 14a.

[4] *Ibid.*, p. 15a. The court below also addressed Rhode Island statutes (General Laws 1956 (1968 Reenactment) § 31-10-27 and § 31-3-9) which authorize state officers to stop motor vehicles for license and registration checks. The court recognized that, to the extent that these statutes authorize random, discretionary checks for license and registration, they have been overruled by this Court's opinion in *Delaware* v. *Prouse*, 440 U.S. 648, 663 (1979). The court declined to decide whether *Delaware* v. *Prouse*'s ruling would apply retroactively to affect a 1974 vehicle stop under the color of statutory authority, ruling instead that regardless of the legitimacy of the initial stop, the continued detention of the vehicle and its occupants after the driver had produced the proper license and registration was unlawful. Appendix A to State Petition, p. 17a and 17b.

passenger glanced backwards several times.[5] Conspicuous by omission is what Officer Calabro, despite his watchfulness, did *not* observe. The vehicle was not speeding; there was no muffler noise; the tail lights were working; there were no traffic or vehicular irregularities of any kind; the vehicle proceeded easterly in an orderly fashion and did not speed up, despite the fact that the occupants had noted the policeman following behind. Officer Calabro did not recognize any of the vehicle's occupants, and had not received any reports of criminal activity in the area that evening. The officer nonetheless radioed for police assistance and ordered the vehicle to stop.

The case of *Terry* v. *Ohio*, 392 U.S. 1 (1968), recognized for the first time an exception to the requirement that seizure of persons could be based on anything less than probable cause. Addressing the need for swift police action in certain street encounters, the *Terry* opinion authorized a brief detention and pat-down for weapons where an officer had specific, articulable reasons for believing a subject was armed and dangerous. 392 U.S. at 27.

While the *Terry* rule clearly applies to automobile stops, *Adams* v. *Williams*, 407 U.S. 143 (1972), this Court has repeatedly emphasized the extremely narrow application of the *Terry* rule and the "grave danger" of police abuse of discretion in detaining citizens. *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 559 (1976). In *Delaware* v. *Prouse*, 440 U.S. 648 (1979), the *Terry* standard was affirmed by a ruling limiting police detentions of motor vehicles to instances where

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[5] The State in its Petition makes much ado of these "backward glances." The Rhode Island Supreme Court noted that "it is not unusual that a passenger might simply take note of a nearby police vehicle." Appendix to State's Petition, p. 14a n.4. "Drivers simply do take notice when the police are nearby, and a person circling a block for whatever reason would take notice of a police car following him." *United States* v. *Montgomery*, 561 F.2d 875, 879 (D.C. Cir. 1977).

"there is *at least articulable and reasonable suspicion* that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law . . .." 440 U.S. at 663 (emphasis added).

Officer Calabro's observations of a low-riding vehicle and backward-glancing passenger do not meet the *Terry/Prouse* criterion of "articulable and reasonable suspicion." In *Brown* v. *Texas*, 443 U.S. 47, 51 (1979), and *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975), this Court has emphasized the requirement of "specific, objective facts" to legitimize a detention.

The underwhelming nature of the "facts" before Officer Calabro stands in marked contrast to the "Chevron" case of *United States* v. *Cortez*, 101 S.Ct. 690 (1981). The Border Patrol officers who stopped Cortez in the Arizona desert had numerous specific reasons — a pattern of illegal immigration indicating a time, place, manner and means by which the suspect could be found — to justify the stop of the suspect's vehicle.

Officer Calabro had no "objective manifestation," *United States* v. *Cortez*, 66 L.Ed.2d 621 (1981), to justify his investigatory detention;

> The inarticulate hunch, the awareness of something unusual, is reason enough for officers to look sharp. Their knowledge and experience identify many incidents in the course of a day that an untrained eye might pass without any suspicion whatever. But awareness of the unusual, and a proper resolve to keep a sharp eye, is not the same as an articulated suspicion of criminal conduct. Defendant's acts, as reported, were too innocuous to warrant the intrusion of a temporary seizure for questioning.

United States v. *Montgomery*, 561 F.2d at 879.

III. The Case of *Delaware* v. *Prouse*, 440 U.S. 648 (1979), Should be Given Retrospective Effect.

Respondents contend that this court's ruling in *Delaware* v. *Prouse*, *supra*, is dispositive of the primary Fourth Amendment issue in the instant Petition, and submit that its ruling should be applied retrospectively.[6]

While it cannot be doubted that most new pronouncements of Fourth Amendment doctrine will be applied prospectively — *Linkletter* v. *Walker*, 381 U.S. 618 (1965) (applying prospectively *Mapp* v. *Ohio*, 367 U.S. 643 (1961)); *Desist* v. *United States*, 394 U.S. 244 (1969) (applying prospectively *Katz* v. *United States*, 389 U.S. 347 (1967)); *Williams* v. *United States*, 401 U.S. 646 (1971) (applying prospectively *Chimel* v. *California*, 395 U.S. 752 (1969)) — the *Linkletter*/*Desist*/*Williams* rationale compelling prospectivity is inapposite to the instant case.

Unlike this Court's rulings in *Mapp*, *Katz*, and *Chimel*, *supra*, *Prouse* did not announce a departure from accepted procedure, but merely clarified that the long-established "articulable and reasonable suspicion" rule of *Terry* v. *Ohio*, *supra*, prohibits baseless and random police searches of citizens in their automobiles as well as on the streets. 59 L.Ed.2d at 667; *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 884 (1975). Police practices acceptable under *Terry* v. *Ohio* face no more strict a scrutiny under *Prouse*. See *State* v. *Rattenni*, 117 R.I. 221, 366 A.2d 539 (1976); *State* v. *Wilson*, 110 R.I. 740, 297 A.2d 645 (1972).

While Rhode Island has long required its citizens to produce license and registration upon demand by proper authority

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[6] Respondents contend, of course, that even if *Prouse* is not applied retroactively, the 1974 actions of the Rhode Island police were subject to the same "articulable suspicion" standard of *Terry* v. *Ohio*, *supra*.

(R.I. General Laws § 31-10-27, § 31-3-9), reliance upon these statutes as authority for capricious vehicle stops is misplaced. Regardless of the statutes' commands, the conditions under which police may demand license and registration are subject to the limitations of the Fourth Amendment, *Cooper* v. *State of California*, 386 U.S. 58 (1967), and it was a decade ago that this Court ruled that detentions of citizens, no matter how brief, cannot be made in the absence of a reasonable and articulable suspicion of criminal activity. *Terry* v. *Ohio*, *supra*; *Adams* v. *Williams*, 407 U.S. 143 (1972).

The *Prouse* Court did not declare a "sharp break in the line of earlier authority or an avulsive change" in the law, *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 499 (1968), but elaborated upon and clarified the "stop and frisk" principles established ten years earlier in *Terry* v. *Ohio*. For this reason, a retrospective application of *Prouse* will not unfairly penalize police conduct, and the deterrent ends of suppression will properly be served. And retrospectivity will not produce an "administrative nightmare," since police conduct which has survived proper scrutiny under *Terry* should fare no worse under *Prouse*. A retrospective application of *Delaware* v. *Prouse* should produce no undue "tax [on] the administration of justice." *Linkletter* v. *Walker*, 381 U.S. at 637. *See also United States* v. *Nicks*, D.C. Ct. App., March 18, 1981, 29 Cr.L.Rep. 2062.

IV. The Investigatory Detention was Conducted without Probable Cause.

Even if the initial stop were justified under *Terry* v. *Ohio*'s standards, this Court's opinion in *Dunaway* v. *New York*, 442 U.S. 200 (1979), makes clear that probable cause must accompany an investigatory detention that exceeds the scope of a

Terry stop. Whatever "articulable suspicion" Officer Calabro may have had was dissipated by the prompt compliance with the order to pull the car over, and the driver's immediate production of proper license and registration.

In *Dunaway*, this Court rejected a claim that investigatory detentions may be based on anything less than the "long-prevailing standard" of probable cause. *Brinegar* v. *United States*, 338 U.S. 160, 176 (1949). The State in its Petition[7] argues that "[g]iven reasonable suspicion based on objective facts, a police officer has the right to detain a person against his or her will for a brief period of investigation." This "reasonable suspicion" was squarely rejected in *Dunaway*: "Respondent State now urges the Court to . . . hold that 'seizures' such as that in this case may be justified by . . . 'reasonable suspicion.' *Terry* and its progeny clearly do not support such a result." 442 U.S. at 211-212.

The case of *United States* v. *Brignoni-Ponce*, *supra*, anticipated the *Dunaway* ruling:

> The officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause.

422 U.S. at 881-882.

There is no colorable claim of probable cause to justify the continued detention in this case. Officer Calabro, having stopped the respondents on the barest of hunches, demanded identification of the driver. Proper documents were produced. Not content with this, the officer demanded iden-

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[7] Page 11.

tification of the passengers. Still not satisfied, he continued the detention until a computer check could be run on all subjects. To uphold this stop, and the continuing detention, would be to render meaningless the standards of reasonable governmental conduct set forth by this Court in *Terry* v. *Ohio*, *supra*, *Delaware* v. *Prouse*, *supra*, and *Dunaway* v. *New York*, *supra*. *See also*, *United States* v. *Chamberlin*, 609 F.2d 1318 (9th Cir. 1979), *modified*, F.2d , 28 Cr.L.Rep. 2159 (1980); cert. pet. filed, No. 80-1112, January 2, 1981.

Conclusion.

The Petition for Writ of Certiorari to the Supreme Court of Rhode Island should be denied.

Respectfully submitted,

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